

having regard to the nature of the remedy or relief claimed." Therefore, the remedy prayed for in the statement of claim is important.

In *Contract Discount Corporation Ltd. v. Furlong & Others*⁽¹⁾ a case under Order 14 and where the plaintiffs claimed £19,811 and the defendants admitted owing a sum of £10,000 "or thereabouts", the High Court gave leave to defend subject to payment into court of £10,000. The Court of Appeal reduced it to £8,000 because of the expression "or thereabouts", which in its view meant that the defendants were entitled to an allowance by way of margin. What is of interest to note is what Asquith L.J. said at p. 277: "If there had been no admission by the defendants in their affidavit in opposition, I do not think that the order appealed from could have been supported but an account would have had to be directed as to the whole sum."

In *Ochse v. Duncan*⁽²⁾ where the action was upon a bill for £799 for millinery and articles of dress ordered by the defendant from the plaintiff, the Master under an Order 14 application gave the defendant leave to defend upon bringing £650 into court or giving security for that amount. The defence raised in the affidavits was that the defendant had not received all the articles and that the charges were excessive. On appeal by the defendant, the Divisional Court gave the defendant unconditional leave to defend. On further appeal by the plaintiff to the Court of Appeal, the decision of the Divisional Court was upheld.

Another pertinent case is *Lynde v. Waithman*.⁽³⁾ There, a mortgagee, who had appointed a receiver to receive rents, brought an action specially indorsing the writ with a claim for the mortgage debt and interest and applied for summary judgment. The Court of Appeal held that as there appeared to be a question as to what was the exact amount due to the mortgagee from the mortgagor, leave to defend was granted. Kay L.J. said at p. 186:

"The writ has no doubt been indorsed with a claim for a liquidated amount, but the evidence, as it stands, appears to me to raise a question whether the amount so claimed is due or not and whether a judge might not properly say that there must be an account of what the receiver has received before there can be a judgment on the claim. Therefore, it appears to me that the case is not a proper case for the application of Order XIV."

While the fact-situations in the above cases are not identical to the present case, the basic issue

A that presented itself in those cases is similar to the present: does Order 14 apply, where liability is not denied but the specific amount claimed is disputed? It seems to me clear, in the light of those authorities, that leave ought to be granted to the defendants to defend the action. The claim is for the sum of \$8,050. There is no alternative claim for unliquidated damages. As the affidavits and defence filed raised questions of fact and law, interlocutory judgment with damages to be assessed is not the proper order to make. It seems to me that such an order should only be given in a case where unliquidated damages are claimed and the defendant fails to establish a right to defend. The present action concerns a specific sum and as that is seriously disputed by the defendants and summary judgment may not be entered for the sum claimed or part thereof, leave to defend should have been given.

Accordingly, the appeal is allowed and the defendants are given unconditional leave to defend the action.

Appeal allowed.

Solicitors: *R.C.H. Lim & Co.; Bala & Partners.*

CITY CAR RENTALS & TOURS PTE. LTD. v. SIM JWEE KIAT

[O.C.J. (Thean J.) 30 January 1988]

[Singapore — Suit No. 3288 of 1983]

Bailment — Whether bailee was negligent — Whether there was breach of contract of bailment — Whether hiring agreement limited bailee's liability in damages.

H By a hiring agreement, the plaintiffs hired a car to the defendant for a period of time at a certain rate of payment. The defendant while driving the car met with an accident. The car had skidded and collided into a boulder. The plaintiffs claimed against the defendant damages for breach of contract and for negligence. The defendant resisted the claim of the plaintiffs, contended that he was not negligent and that by virtue of clause 5(b) of the agreement his liability for damages was limited to \$1,000.

I Held: (1) the defendant must have been driving the car so fast in the circumstances and failed to manage and control the car so as to avoid the collision. He had not discharged the burden of proving that the accident happened without his fault;

(2) clause 5(b) of the agreement did not apply to relieve the defendant from liability for the damage to the vehicle in excess of \$1,000;

(3) since the quantum of damages was disputed, interlocutory judgment should be granted to the plaintiffs.

Cases referred to:

- (1) *Alderslade v. Hendon Laundry, Ltd.* [1945] K.B. 189 (consd).
- (2) *Canada Steamship Lines Ltd. v. The King* [1952] A.C. 192 (consd).
- (3) *Price & Co. v. The Union Lighterage Co.* [1904] 1 K.B. 412 (refd).

CIVIL SUIT.

Michael Liew for the plaintiffs.

Mohamed Abdullah for the defendant.

Cur. Adv. Vult.

Thean J.: By a hiring agreement dated 3 April 1980 ("the agreement") the plaintiffs hired a car, a Mercedes Benz, No. SZ 2693, to the defendant for a period of four days at the rate of \$180 per day plus a further charge at the rate of \$10 per day for "vehicle and vehicle collision damage waiver" insurance. The car was hired by the defendant for a trip to West Malaysia. On 4 April 1980, the defendant left Singapore for Kuala Lumpur driving the car, and with him were three passengers. He met with an accident at the 12-milestone, Jalan Tampin in Gemas. The car skidded and collided into a boulder at the side of the road; the defendant was injured and the car was damaged. The car was towed to a police station in Johore, and was released to the plaintiffs on 13 April 1980. It was then surveyed and subsequently repaired. The plaintiffs claimed against the defendant for damages for breach of contract and for negligence.

The claim was resisted by the defendant and the defence was two-fold: first, the defendant denied that there was any negligence; the car suddenly skidded and collided into a boulder at the side of the road without any negligence on his part. Secondly, the defendant averred that he had purchased the "vehicle and vehicle collision damage waiver" insurance and pursuant to clause 5(b) of the agreement the plaintiffs agreed to relieve him of all liability for damage arising out of, *inter alia*, collision in excess of \$1,000. In other words, his liability for the damage was limited to \$1,000.

There were two issues before me: (i) whether the accident was caused by the negligence of the

defendant; (ii) if the answer to this question is in the affirmative, whether the provision of clause 5(b) of the agreement applies and relieves the defendant from liability for damage exceeding \$1,000. At the conclusion of the trial, I held that the damage to the car was caused by the negligence of the defendant and that clause 5(b) of the agreement did not apply to relieve the defendant from such liability for the damage to the vehicle in excess of \$1,000; I gave interlocutory judgment to the plaintiffs and ordered damages to be assessed. I also awarded costs to the plaintiffs.

The first issue is one of fact. It was not in dispute that at the material time the defendant was driving the car and that the car collided into a boulder at the side of the road and sustained serious damage. The agreement was a contract of bailment and the defendant as a bailee was bound to exercise reasonable care of the chattel bailed, *i.e.* the car. As the car was in his possession and under his control when it was damaged, a *prima facie* case that he had failed to exercise reasonable care arose and the burden was on him to show that he had exercised reasonable care and that the accident occurred without any negligence on his part. The question therefore was whether on the evidence before me the defendant had discharged that burden. The defendant gave evidence. He said that the stretch of road at which the accident occurred was a two-way traffic and was winding, and at the material time he was travelling at a speed between 50 kph and 60 kph. The road was dry and it was not raining. While he was negotiating a bend, the car suddenly skidded, and thereupon he applied the brakes but lost control of the car, as a result of which it collided into the boulder at the side of the road on the right, that is, the off-side. He did not attempt to overtake any vehicle at the time, and denied that he was travelling at a fast speed. According to the photographs (AB14-18), the front of the car on the right side was seriously damaged, and there was no dispute that the car collided into the boulder on the off-side. When the defendant lost control of the car, it must have veered across to the lane for the oncoming traffic and collided into the boulder at the side on the right. The defendant seemed to suggest that the skidding of the car was due to some oily or greasy patches on the road. But he did not see these patches before the accident. He did not see them, and indeed could not have seen them after the accident as he was injured. He then seemed to suggest that his friend or friends — the passengers in the car — saw them. However, none of his friends were called to give evidence. I found his

evidence unconvincing. I think that he must have been driving the car too fast in the circumstances and failed to manage and control the car so as to avoid the collision. In my opinion, he had not discharged the burden of proving that the accident happened without his fault. The plaintiffs therefore succeeded in establishing negligence on the part of the defendant.

The second issue turns on the true construction of the provisions of clause 5(b) and (c) of the agreement, which are as follows:

"5. That hirer expressly acknowledges personal liability to pay owner on demand:

- (a)
- (b) vehicle and vehicle collision damage waiver and miscellaneous charges at the rate specified overleaf unless hirer had purchased in advance the 'vehicle and vehicle collision damage waiver' insurance, in which case, owner shall relieve hirer of all liability for damage arising out of collision, upset, malicious mischief, vandalism, falling objects, missiles, glass breakage, fire, smoke, water or smudge in excess of \$1,000. Hirer shall nevertheless reimburse owner upon receipt of its invoice the first \$1,000 being the excess provided of any loss or damage arising out of each incident or event;
- (c) the full amount of all costs, or damages incurred or sustained by the owner as a result of:
 - (i) theft;
 - (ii) conversion by any of the hirer's drivers, agents or authorized operators;
 - (iii) the deliberate act or omission of the hirer, his servants or agents;
 - (iv) any violation of the terms or conditions of this agreement;
 - (v) any reckless, abusive, careless or inconsiderate handling of the said vehicle by the hirer, his servants or agents;
 - (vi) collision or upset, loss or damage caused by the negligent operation of the said vehicle under the control of the hirer, his servants or agents.
- (d)
- (e)"

It was accepted by both counsel for the plaintiffs and the defendant that the defendant had paid to the plaintiffs the charges specified in the agreement and had taken out with the plaintiffs the "vehicle and vehicle collision damage waiver" insurance within the meaning of paragraph (b) of clause 5. Both counsel further accepted that the following part of paragraph (b): "in which case, owner shall relieve hirer of all liability for damage

arising out of collision, upset ... in excess of \$1,000" should be read to apply where such insurance had been taken. Mr. Abdullah for the defendant argued that by reason of this provision and in particular the very wide phrase "all liability for damage arising out of collision", the defendant's liability was limited to \$1,000. In urging me to adopt this construction of clause 5(b), Mr. Abdullah in effect ignored the presence of clause 5(c) which imposed on the defendant an obligation to pay to the plaintiffs costs or damages incurred and sustained as a result of, *inter alia*, reckless, careless or inconsiderate handling of the car or collision or loss or damage caused by negligent operation of the car under the control of the defendant.

It was argued by Mr. Liew on behalf of the plaintiffs that clause 5(b) had no application in this case on the ground that the cause of damage of the car did not fall within any one of the causes enumerated therein. The only cause enumerated in clause 5(b), which could be of some relevance, he argued, was "collision", but, in his submission, "collision" in the context of the clause meant a collision between two "moving bodies", whereas in this case it was a collision between a moving vehicle and a stationary boulder. I rejected this argument; it gives too narrow a meaning to the word "collision". I think that in ordinary sense an impact between a moving object and a stationary one is also a "collision". The meaning of this word as given in *The Concise Oxford Dictionary* (7th Ed.), in so far as relevant, is "violent encounter of moving body, especially ship or vehicle, with another or with fixed object". In this case, the collision between the car and the stationary boulder is, in my opinion, a collision within the meaning of clause 5(b), and, for that matter, also within the meaning of clause 5(c).

Mr. Liew next argued that clause 5(b) on a proper construction did not apply to limit the liability of the defendant for damages for negligence, and he relied on the rule of construction that a provision excluding or limiting liability must be construed strictly and in the absence of clear words the courts will not construe such provision so as to exclude or limit liability for negligence. In this case, the damage was caused by the negligence of the defendant and negligence was not one of the causes specified in clause 5(b) and the provision therein was not wide enough to cover negligence. Damage caused by negligence, he submitted, was covered by clause 5(c) which applied. In substance, I agree with his submissions.

Mr. Liew referred me to various authorities some of which I find extremely helpful. As a starting point, I cannot do better than quote the following passage from the judgment of Lord Greene M.R. in *Alderslade v. Hendon Laundry, Ltd.*⁽¹⁾ at p. 192, where he said:

"... The effect of those authorities can, I think, be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence..."

In that case, a laundry company relied on a condition to limit its liability, which was in the following terms: "The maximum amount allowed for loss of damaged articles is twenty times the charge made for laundering", and it was held that this clause was effective to limit the liability of the laundry company, as a loss of articles in that case could only arise through the negligence of the laundry company.

These principles of construction laid down by Lord Greene M.R. were approved by the Privy Council in *Canada Steamship Lines Ltd. v. The King*.⁽²⁾ There, the Crown leased a freight shed to a lessee and clauses 7 and 8 thereof provided as follows:

"7. That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, ...

8. That the lessor will, at all times during the currency of this lease, at his own cost and expense, maintain the said shed, ..."

A fire broke out at the shed owing to the negligence of the servants of the Crown and caused damage to the lessee. To a claim for damages, the Crown pleaded clause 7 as a bar to the claim. It was held by the Privy Council that the clause was to be construed as relating to a liability not based on negligence and the Crown was not protected against the claim. In delivering the judgment of the Board, Lord Morton of Henryton said, at p. 208:

"Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:

A (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Company v. Pilkington*.

B (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada. 'In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.'

C (3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence', to quote again Lord Greene in the *Alderslade* case. The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are *prima facie* wide enough to cover negligence on the part of his servants."

D Later, applying those principles and in construing clauses 7 and 8 of the lease, he said, at p. 210:

E "So far, clause 7 has been considered apart from clause 8, but these two clauses must be read together, according to the ordinary principles of construction. So reading them, it appears to their Lordships most unlikely that clause 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed on the Crown by clause 8."

F I think the position, so far as relevant, is summarized in paragraphs 878 and 879 of *Chitty on Contracts* (25th Ed.), which are as follows:

G "Liability for negligence. Liability for negligence may be effectively excluded if words are used which indicate that all damage, however caused, is to be comprehended within the exemption, or which throw the risk upon the plaintiff. H If the defendant merely says 'any loss', he is directing attention to the kinds of losses, and not to their cause or origin; so liability for negligence will not necessarily be excluded. But if he says 'however arising' or 'any cause whatever', these words will cover losses by negligence ...

I "Possible heads of damage. Where there is no clear exclusion, but the words used are sufficiently general to be capable of excluding liability for negligence, it may be necessary to consider whether or not there are possible heads of damage, other than negligence, in respect of which (apart from the exemption clause) the defendant could be held liable. If the only liability of the party pleading the exemption is a liability for negligence the clause will more readily operate to exempt him. ..."

In this case, paragraph (b) of clause 5 relieves the defendant "of all liability for damage arising out of collision ..." but does not go further to define the cause of collision; in particular the clause does not say after the word "collision", "howsoever caused". Though the words "all liability", are wide, they are limited by the causes that follow: "arising out of collision, upset, ...". Immediately following is paragraph (c) which expressly covers, *inter alia*, instances of negligence: see instances in sub-paragraphs (v) and (vi) of paragraph (c). Paragraph (b) also spells out causes or origins for loss or damage not relating to negligence in respect of which the hirer could be held liable. In my opinion, the two paragraphs must be so construed as to give sense and effect to each, and the cause of damage, "collision", in paragraph (b) must be reconciled with the cause of damage in paragraph (c)(vi), namely: "collision ... caused by negligent operation of the said vehicle under the control of hirer, ...". In so far as collision is concerned, paragraph (b) applies to relieve the hirer of all liability arising from collision not caused by negligence of the hirer, and paragraph (c)(vi) applies and imposes a liability on the hirer for damage arising from collision caused by the negligent operation of the vehicle under the control of the hirer.

Mr. Liew further relied on the case of *Price & Co. v. The Union Lighterage Co.*⁽³⁾ There, the goods were loaded on the barge under a contract for carriage and the contract contained the clause exempting the barge owner from liability "for any loss or damage to goods which can be covered by insurance". The barge sank owing to the negligence of the servants of the barge owner and the goods were lost. The court held that the "exemption" being in general terms not expressly relating to negligence, the barge owner was not exempted from liability for loss of damage caused by negligence.

At the conclusion of the trial, I ordered that interlocutory judgment be given for the plaintiffs because Mr. Abdullah appeared to me to have misunderstood the position relating to admission of the bundle of documents. I noted from his written submission that he was disputing the quantum, and on being questioned, he said he did not accept the bundle of documents as an agreed bundle in the full sense but he agreed to their admission as formal documents with liberty to challenge the contents. For this reason, I decided that interlocutory judgment be entered and ordered that damages be assessed, which should

A then give the defendant a chance to dispute the quantum.

Order accordingly,

Solicitors: *R.C.H. Lim & Co.; Murphy & Dunbar.*

C **N.M. ROTHSCHILD & SONS (SINGAPORE) LTD. & 5 ORS. v. RUMAH NANAS RUBBER ESTATES SDN. BHD.**

[O.C.J. (Thean J.) 29 February 1988]

D [Singapore – Appeal in Suit No. 5830 of 1986]

Contract – Guarantee – Claim under the guarantee.

E The plaintiffs and Oversea-Chinese Banking Corporation Limited granted certain loan facilities to one Freelin Investment Pte. Ltd. The defendants were one of the guarantors under the loan agreement. In the present case, the plaintiffs sought the amounts due under the guarantee. Summary judgment was obtained by the plaintiffs. The defendants appealed. The defendants raised various issues.

Held: none of the defences raised on behalf of the defendants constituted a triable issue.

F *Case referred to:*

(1) *Public Prosecutor v. Tan Koon Swan* [1987] 1 M.L.J. 18 (refd).

G **CIVIL SUIT.**

Davinder Singh for the plaintiffs.

C.S. Wu (Eugene Lim with him) for the defendants.

H *Cur. Adv. Vult.*

I **Thean J.:** On 1 August 1986, a company called Freelin Investment Pte. Ltd. ("Freelin") entered into three agreements ("option agreements") with three stockbrokers respectively, namely: E.G. Tan & Co. (Pte.) (in liquidation), J. Ballas & Co. (Pte.) Ltd. and Ong & Co. Pte. Ltd., whereby Freelin granted to them "an option" (which in effect is a right) to require Freelin to purchase from them *in toto* the following securities, namely, (i) 16,913,000 shares of M\$1 each in Grand United Holdings Berhad ("Grand United"), (ii) 5,938,000